

DRAFTING EFFECTIVE ARBITRATION CLAUSES FOR CRITICAL BUSINESS TRANSACTIONS

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Checklist to consider in drafting business related ADR clauses:

- Broad verses Narrow Clause?
 - “Any controversy or claim **arising out of or relating to this contract**, or the breach thereof, shall be settled by arbitration administered by the _____ Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”
 - “Risks” of self-administered arbitrations
 - Multi-step clause with mediation then arbitration?
- Should all disputes be arbitrable?
 - What, if anything, should be excluded?
 - Injunctive/Provisional relief for federal issues?
 - Who decides arbitrability issues?
 - Will court action be necessary to “clarify” scope of what is arbitrable?
- Will the clause be self-enforcing?
 - Is it merely an “Agreement to Agree?”
 - Participation in the proceedings constitute a waiver of non-self-enforcing clause?
- Will the clause clearly state what arbitral rules will apply?
 - Are all the rules appropriate for “your” dispute?
 - Specialized rules of the arbitral provider?
 - Should the rules be tailored?
- How/who will decide the number and composition of the arbitration panel?
 - Pro/Cons of using/providing a “named” arbitrator in the clause—sunset/unavailability provision?
 - Do “you” only want 1 arbitrator?
 - Subject matter expertise important?
 - Due-Diligence on arbitrator selection?
 - Party-Appointed Arbitrators?
 - ✓ Neutral verses non-neutral arbitrators
- Any “significant” procedural issues that should/not be addressed in clause?
 - Class Actions or additional parties?
 - Discovery permitted and, if so, permitted scope?
 - ✓ Clients want less discovery by selection of arbitration? See 2003 AAA “Dispute-Wise Management®--Improving Economic and Non-Economic Outcomes In Managing Business Conflicts” Report
 - Who can/should sign/issue subpoenas for discovery?

- Where will the arbitration take place—venue?
 - Will the specified venue control?
 - Will/should the arbitral association make a binding decision on locale?
 - ✓ Will enforceability of venue provision be an issue?
 - Will any State statute “control” venue question notwithstanding contract provision providing for venue? See, e.g. Cal. B&P Code §20040.5
 - ✓ Role of Federal Arbitration Act (FAA)?
- Fees, Costs, Attorney Fees Recovered?
 - See Leamon v. Krajciwicz, (F038025, Calif. Ct. of Appeals, Fifth District, filed 2/24/2003), compliance with contractual pre-arbitration provision, i.e. mediation, required in order to obtain attorney fees?
- Choice of law for contract verses choice of law for arbitration provision
- Should/does the clause “require” the arbitrator to “follow the law?”
 - “Manifest Disregard of the Law” standard?
 - Grounds for appeal in contract?
- Other drafting concerns.
 - Bar punitive damages?
 - Prohibit joinder of parties?
 - Reasoned award required from arbitrator(s)?
- Any clause enforcement issues?
 - Unconscionability—Fairness
 - Applicability of Contract defenses
 - Severability
 - Preemption—FAA?

Does the California Judicial Council Arbitration related rules on disclosure/disqualification, etc. “trump” the FAA? (See *Jevne v. Cal. Superior Court (JB Oxford Holdings, Inc.)* - filed November 19, 2003, Second District, Div. Seven and “Stock Answer to Ethics Spat,” ABA Journal, March 2003, page 14)
- Specific concerns in drafting that are unique to the nature/business of dispute?
 - Employment/Discrimination
 - Entertainment
 - Franchise
 - **Baseball Arbitration desired to “ensure” negotiated/mediated solution?**

See American Arbitration Association “Drafting Dispute Resolution Clauses—A Practical Guide.” Also, visit the AAA website at www.adr.org.